No. 10393

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KENNETH BENJAMIN EDWARDS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S SUPPLEMENTAL BRIEF.

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TABLE OF AUTHORITIES CITED.

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APPELLEE'S SUPPLEMENTAL BRIEF.

I.

The Appellant Had Not Exhausted the Selective Service Process and Therefore Was Not in a Position to Challenge the Arbitrariness of the Action of the Selective Service Agencies in Not Classifying Him in Class IV-D.

In appellant's reply brief it is claimed that appellant complied with the order of the board in that he appeared at the time and place directed in the board's order; that is, that he appeared at the office of the local board on June 1, 1942. However, he refused to go to the civilian public service camp, as ordered by the local board. [R. 24.]

It is stated in *Falbo v. United States,* 320 U. S. 549, at page 553, referring to any registrant:

> "If he has been classified for military service, his local board orders him to report for induction into the armed forces. If he has been classified a conscientious objector opposed to noncombatant military service, as was petitioner, he ultimately is ordered by the local board to report for work of national importance. In each case the registrant is under the same obligation to obey the order. But in neither case is the order to report the equivalent of acceptance for service. Completion of the functions of the local boards and appellate agencies, important as are these functions, is not the end of the selective service process. The selectee may still be rejected at the induction center and the conscientious objector who is opposed to noncombatant duty may be rejected at the civilian public service camp. Section 3(a) of the Act provides in part that '. . . no man shall be inducted for training and service under this Act unless and until he is acceptable to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined . . .' We are informed by the government that pursuant to this section approximately forty per cent of the selectees who report under orders of local boards for induction into the armed forces are rejected, and that, as of October 15, 1943, six hundred and ten of the eight thousand selectees who had reported for civilian work of national importance had been rejected. The connected series of steps into the national service which begins with registration with the local board does not end until the registrant is accepted by the army, navy, or civilian public service camp."

As of October 15, 1943, as is pointed out in the footnote, six hundred and ten of the eight thousand selectees who had reported for civilian work of national importance had been rejected. Had this appellant complied with the board's order and reported at the camp, he might also have been rejected. Therefore, he had not completed the selective service process, as he had not taken the last Step. Consequently, appellant is in error in the contentions made in footnote 3 of appellant's reply brief. The indictment is not defective; the appellant did fail "to report for work of national importance in lieu of induction into the armed forces of the United States"; he simply "reported" at the draft board. The indictment rightfully does not allege that he "refused to submit to *induction*" as "induction was not a requirement under the draft board's order. A registrant is not "inducted" when he reports for work of national importance under civilian direction. Appellant, if he had complied with all of the orders of the board, even to entering the public service camp for duty, would never have been required to come under military authority.

The Government contends that a registrant who is ordered to report for work of national importance must comply with the order of the board and report for work of national importance, and that he may then contest the legality of the order by petitioning for writ of habeas corpus.

Appellee cannot see of what avail the *Billings* case is in this instance. (*Billings v. Truesdell,* decided by the

Supreme Court on March 27, 1944.) Under the law as laid down in that case, a registrant need not submit to military authority in order to put himself in a position to contest the legality of the orders of the board.

The *Falbo* case was concerned with the fate of a conscientious objector classified as IV-E, and ordered to report for work of national importance, as was the appellant in the case at bar; the *Billings* case was concerned with the rights of a registrant classified as 1-A and ordered to report for induction into the armed forces. The *Billings* case has not modified the law enunciated in the *Falbo* case in so far as it applies to a conscientious objector.

There is no doubt but that a selectee should submit to the final order of the draft board. This Honorable Court has so held in *Enge v. Clark,* C. C. A. No. 10367 (June 30, 1944) in the following language:

> "We hold that appellant should have presented himself for induction, where he may have been rejected because of physical or mental unfitness under Section 3(a) of the Act. (See footnote 7, page 553, Falbo v. United States, 320 U. S. 549.) Since he has then exhausted the administrative process, after physical examination and acceptance he 'may then challenge an order (of the Board) in the courts.' Billings v. Truesdell, ... U. S. ....., decided March 27, 1944. If he submit to induction he is not without remedy. He, or someone on his behalf, then may seek to assert the alleged violation of his constitutional or other rights by a petition for writ of habeas corpus addressed to the military commander under whom he is serving."

II.

No Testimony Offered and Stricken by the Trial Court Tended to Prove That Appellant Did Not Have a Fair Hearing.

The testimony ordered stricken was to the effect that the chairman of the local board had stated of Jehovah's Witnesses,

> "I think the organization is rotten, it stinks. The whole organization stinks. It is a disgrace to Christianity. I have no use for it at all." [R. 26, 27.]

This statement was alleged to have been made to a person not a party to, and not in connection with, the classification of the appellant. Had the testimony been admitted, it would not necessarily have shown that the appellant had not been accorded a fair and impartial hearing. The appellant had not required the attendance of the chairman of the draft board at the trial; the chairman had not testified, and had not been confronted with the purported conversation. It is not proper to attempt to establish arbitrary and capricious action on the part of the draft board involving any registrant by the testimony of a witness to statements made by a draft board member outside the draft board offices and not in connection with any particular proceeding or classification concerning such registrant. The substantive defense of the appellant, therefore, was wholly immaterial.

Conclusion.

The appellant was not deprived of his "day in court." The appellant had not exhausted the Selective Service process and was, therefore, not entitled to examine into the actions and mental attitude of the members of the draft board. The judgment of conviction and sentence should be affirmed.

Respectfully submitted,

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